

*U.S. DEPARTMENT OF COMMERCE  
Office of Inspector General*

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*United States Patent and Trademark Office*

*USPTO Needs Strong Office of Human  
Resources Management Capable of Addressing  
Current and Future Challenges*

*Report No. BTD-16432-4-0001/June 2004*

**PUBLIC RELEASE**

*Office of Audits, Business and Science Audit Division*



UNITED STATES DEPARTMENT OF COMMERCE  
The Inspector General  
Washington, D.C. 20230

JUN 16 2004

MEMORANDUM FOR: Jon W. Dudas  
Acting Under Secretary of Commerce for Intellectual  
Property and Acting Director of the U.S. Patent and  
Trademark Office (USPTO)

FROM: Johnnie E. Frazier 

SUBJECT: USPTO Needs Strong Office of Human Resources  
Management Capable of Addressing Current and Future  
Challenges  
Final Audit Report No. BTD-16432-4-0001

As follow-up to our April 16, 2004, draft report, we are providing you with the final report of our review of complaints regarding USPTO's human resources management. We appreciate USPTO's general agreement with, and expeditious plans to address the report's findings and recommendations. USPTO's complete response to our findings and recommendations is included as Appendix I.

### Executive Summary

We initiated this audit in response to (1) complaints of the agency's lack of compliance with merit system principles; (2) a related request for review from USPTO's chief financial/chief administrative officer (CFO/CAO); and (3) our concerns—supported by prior OIG evaluations—about the history of problems that have been identified with USPTO's conduct of its HR function.

As we assessed the validity of the complaints, we also sought to identify any systemic weaknesses that might be fostering the problems, with the goal of offering recommendations to correct such deficiencies and thereby improve the overall operations of USPTO's Office of Human Resources (OHR). USPTO's status as a performance-based organization (PBO) brings with it unique opportunities and potential perils, both of which are evident in its responsibility for establishing its own sound and efficient personnel practices. Such practices are not only critical to the agency's ability to hire and



retain the hundreds of new patent examiners it anticipates needing in the coming years, but are essential to supporting a positive and productive work environment.

The allegations we received suggested that such practices were not in place. Specifically, the complainants charged, among other things, that USPTO

- did not adhere to merit system principles in appointing an interim manager for its Office of Human Resources, and
- improperly classified and recruited for the position so as to give unfair advantage to the interim appointee.

USPTO suspended the aforementioned recruitment effort, pending the outcome of our review.

We concluded that the process used to fill the director position was seriously flawed, finding, among other problems, that the position description was improperly classified (see page 8) and the announcement and application process did not follow HR regulations (see page 9), largely because the agency has not implemented appropriate HR management controls (see page 10).

We noted that USPTO must promptly

- implement management controls to ensure adherence to merit system principles (see page 5);
- officially clarify the nature of its relationship with the Office of Personnel Management (OPM) (see page 5); and
- establish sound HR policies and procedures to guide its operations and decision-making (see page 6).

USPTO must also ensure that these policies and procedures promote an HR environment that operates on integrity, the highest ethical values, and sound human capital management practices, and that OHR itself is staffed by employees who have the full competencies needed to accomplish their assigned duties.

The key to all of this is the need for USPTO to take the necessary actions to create an effective Office of Human Resources that has the strong leadership needed to address weaknesses that have too often undermined the agency's HR operations.

We note that USPTO has been generally receptive to our findings and recommendations, and has, for example, been working with OPM to recruit and hire a new director, and undertaken a number of other positive actions to identify and better address some of the conditions that have contributed to its HR problems. According to the CFO/CAO, these efforts are already increasing agency awareness of the corrective actions and efforts needed to significantly improve its human resources operations.



In response to the draft report, USPTO generally agreed with the findings and recommendations and indicated that it plans to move expeditiously to address them. USPTO also underscored significant steps it has taken to address HR management in addition to the recommendations made in our report. These steps included (1) hiring a contractor to assess the OHR organization and its staff and develop short and long-term strategies for improving the OHR, and (2) obtaining assistance from OPM to recruit for a permanent HR director. USPTO also made several other comments, some of which we summarized and addressed at the appropriate locations in the report, and others that we addressed by adding clarification in the report. USPTO's complete response to our findings and recommendations is included as Appendix I.

We appreciate the cooperation and courtesies provided by your staff throughout the course of our audit. Steps discussed in the USPTO response to our draft report should provide a firm foundation for developing an audit action plan. As outlined in DAO 213-5, please provide us with the audit action plan addressing all of the report recommendations within 60 days of the date of this memorandum. Should you need to discuss the contents of this report or the audit action plan, please call me on (202) 482-4661, or William F. Bedwell, Jr., Acting Deputy Assistant Inspector General for Audits, on (202) 482-1934.

## **INTRODUCTION**

The director of the Office of Human Resources (OHR) at USPTO serves as the agency's principal human capital advisor. The HR director oversees a staff of approximately 90 employees who are primarily classified in the human resources occupational series, which means that their duties and responsibilities require knowledge and experience of human resource regulations, policies, and procedures. OHR services more than 6,600 patent and trademark examiners and administrative staff. Management of the agency's HR office has been transient for some time: since the mid-1990s two permanent directors and various acting directors have come and gone, the last permanent director having left in March 2003 after two and a half years on the job.

Previous OIG reviews of the OHR management and recruitment practices found substantial mismanagement of important personnel records and the need to improve recruitment and retention of patent examiners.<sup>1</sup> USPTO indicated that it addressed these concerns in response to our report recommendations. Our office has recently received additional complaints about USPTO's management of its human resources. The charges in the complaints that were the impetus for this review questioned USPTO's adherence to merit system principles. Among other things, they alleged that USPTO did not adhere to federally mandated merit system principles in appointing an interim manager for its human resources function, and improperly classified and recruited for the position so as to give unfair advantage to the interim appointee.

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<sup>1</sup> Office of the Inspector General. *Patent and Trademark Office, Improved Internal Controls Needed for Office of Human Resources*, BTD-12830, September 2000; and *U.S. Patent and Trademark Office, Patent Examiner Hiring Process Should be Improved*, BTD-14432-2-0001, March 2002.

The HR director recruitment effort, which began in August 2003, was suspended by USPTO, pending the outcome of our review. We briefed the USPTO CFO/CAO in November 2004 about our preliminary findings and some possible solutions to deal with them during the course of our review. USPTO was generally receptive and has, for example, since sought assistance from OPM to recruit and hire a new HR director. This process is currently underway.

Title 5 of the United States Code (5 U.S.C.) provides the statutory basis for human resources management in the federal government, setting forth, among other things, the requirements that agencies abide by merit system principles and ensure fair and open competition and equal opportunity protections for all federal employees and applicants for employment. Title 5 also defines OPM and agency authority for identifying and filling positions: agencies must obtain authority from OPM to fill positions through competitive examining procedures, and OPM, in turn, oversees the agency's delegated examining process to ensure it complies with federal mandates. To make internal merit promotions and placements, which primarily involve candidates already in federal service, agencies do not need a delegation from OPM, but must have in place a merit promotion plan that provides a systematic means of selection based on merit. OPM retains the authority to review merit promotion and placement actions, and the overall accountability structure maintained by the agency. Executive Order 13197, *Governmentwide Accountability for Merit System Principles; Workforce Information*, also emphasizes the importance for agencies and OPM to ensure that merit system principles are upheld.

The Patent and Trademark Office Efficiency Act of 1999 requires USPTO to be subject to the policy direction of the Secretary of Commerce but otherwise allows for USPTO to have independent control of its personnel decisions and processes and other administrative and management functions in accordance with Title 5. Departmental Organization Order (DOO) 10-14, Section 3, *Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office*, describes these functions for USPTO as follows:

- Developing, implementing, and improving management structures, systems, tools, and practices to achieve the highest degree of management efficiency, operational effectiveness, and economy and to limit the opportunity for fraud and mismanagement.
- Developing and issuing agency administrative orders, policies, standards and procedures for administrative functions in USPTO;
- Developing and administering the personnel management policies and programs of USPTO, including the direction, administration, and processing of all matters involving personnel, payroll, and occupational safety and health; and
- Protecting USPTO's assets, operations, and personnel.<sup>2</sup>

<sup>2</sup> DOO 10-14, August 7, 2002, Section 3.01, e.7, 14, 21, and 23.

## **OBJECTIVES, SCOPE, AND METHODOLOGY**

The purpose of this audit was to determine whether USPTO adhered to federally mandated merit system principles in their attempts to hire an HR director. As part of our methodology, we also sought to identify systemic problems that, if corrected, would enable OHR to improve its operations. In pursuing our objectives, we reviewed appropriate laws and department organization orders affecting USPTO; we also reviewed laws, regulations, policies, and procedures regarding the civil service system, merit system principles, and government requirements for recruitment, hiring and promotion. In addition, we reviewed pertinent OPM guidance, and interviewed human resources specialists and managers from OPM, the Department, and USPTO. Our review, except where noted in this report, did not assess compliance with laws and regulations.

We performed the audit fieldwork at USPTO in Crystal City, Virginia, and at the Department of Commerce and OPM in Washington, D.C. from September 2003 through January 2004. We did not assess the reliability of computer-generated data because such data was not material to our audit objectives. We conducted our work in accordance with Government Auditing Standards issued by the Comptroller General of the United States, and under authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13, dated May 22, 1980, as amended.

## **FINDINGS AND RECOMMENDATIONS**

### **I. USPTO Needs to Ensure Management Controls Are in Place to Uphold Merit System Principles**

The Patent and Trademark Office Efficiency Act of 1999 allows for USPTO to have independent control of its personnel decisions and processes and other administrative and management functions in accordance with Title 5. Departmental Organization Order (DOO) 10-14, dated July 8, 2002, states that the USPTO Director shall exercise administrative and management responsibilities to develop and issue agency administrative orders, policies, standards, and procedures for administrative functions in USPTO and to develop and administer the personnel management policies and programs of USPTO, including the direction, administration, and processing of all matters involving personnel, payroll, and occupational safety and health. At the time of our review, USPTO had not fully implemented DOO 10-14.

#### ***A. To Ensure Appropriate Oversight of the HR Function, USPTO Needs to Clarify the Nature of Its Relationship with OPM***

In a January 8, 2004 memorandum associated with this review, we advised the acting director of USPTO that our audit had revealed that USPTO had failed to obtain delegated examining authority from OPM. Without this delegation, agencies are not permitted to fill civil service positions with candidates applying from outside the federal workforce. To obtain this authority, agencies enter into a signed agreement with OPM, which

establishes their specific responsibilities in conducting competitive examining. In turn, OPM provides delegated examining unit training and guidance, as well as oversight of the agency's delegated examining unit to ensure that federally mandated merit system principles and protections are upheld.

In its January 28, 2004, response to us, USPTO stated,

Because the Department of Commerce's (DOC) delegation of authority was transferred to the USPTO by operation of law, we disagree that the USPTO has been acting without appropriate authority. We agree, however, based on the IG's finding that certain individuals at OPM have expressed a contrary view, that we should expeditiously seek revision of the delegation document to more explicitly state the existing legal relationship between the USPTO and OPM.

While an OPM review of USPTO in September 2001 indicated that they were aware of USPTO's status as a PBO,<sup>3</sup> OPM officials we interviewed in the fall of 2003 told us that they believed that USPTO was still operating under the Department's delegation of examining unit authority and were unaware the USPTO no longer received oversight from the Department's OHR.

The issue of delegated examining authority is not addressed in DOO 10-14. However, USPTO believes that the Department's delegation of examining authority was transferred to it as part of the Efficiency Act. USPTO points out that the purpose of the Efficiency Act was to transfer to USPTO the administrative authorities and responsibilities previously held by the Department, including delegations of authority. In contrast to USPTO's understanding, OPM's delegated examining authority agreement states that the Department's delegated examining authority cannot be redelegated which makes USPTO's position that the examining authority was transferred questionable. To clarify this issue, we believe that USPTO should work with the Department and OPM to officially obtain delegated examining authority through a signed agreement.

#### ***B. USPTO Needs to Establish HR Policies and Procedures to Guide Decision Making***

As part of its responsibilities under the Patent and Trademark Efficiency Act of 1999, as detailed in Commerce Departmental Organization Order 10-14, USPTO is responsible for developing and issuing agency administrative orders, policies, standards and procedures for administrative functions in USPTO and developing and administering the personnel management policies and programs of USPTO, including the direction, administration, and processing of all matters involving personnel, payroll, and occupational safety and health; and personnel.

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<sup>3</sup> U.S. Office of Personnel Management, Office of Merit System Oversight and Effectiveness, *Report of an Oversight Review U.S. Patent and Trademark Office, Department of Commerce*.

However, when we asked USPTO officials for copies of their policies and procedures used to carry out their HR responsibilities, USPTO officials stated that they relied on departmental policies and procedures,<sup>4</sup> Title 5 of the United States Code, and “some of their own” guidance. When we questioned USPTO about the organizational responsibilities, they originally provided us with an outdated copy of the DOO. During our review, we did find some USPTO-specific HR policies and procedures, such as the telework policy and the merit assignment program. However, toward the end of our review, we were told that USPTO never completed agency administrative orders, organizational descriptions for aspects of HR operations, and other standard operating procedures that would provide the basis for management actions. If USPTO wishes to hire hundreds of new examiners in a very short timeframe, it is essential that the policies and procedures governing such hirings be in place and understood by all of the individuals who will be participating in those hirings.

### ***C. Summary of Specific USPTO Comments to the Draft Report and OIG Response***

USPTO stated that it was concerned that the report implies that USPTO’s decision to continue to rely upon the Department’s policies and procedures is somehow improper. USPTO explained that shortly after the enactment of the Efficiency Act, the USPTO Director elected (as noted in 65 Federal Register 17858, April 5, 2000) to continue to follow the Department’s regulations applicable to USPTO, until otherwise indicated. DOO 10-14, dated July 8, 2002, clearly states that USPTO Director should *develop and administer* the personnel management policies and programs of USPTO. If USPTO has elected to use some of the Department’s policies and some of their own, as it told us, then USPTO should have designated which of the Department’s policies it was administering and which policies and procedures are developed and administered by USPTO.

In its response, USPTO stated that it is currently taking such a step, “...USPTO is currently reviewing all DAOs [Departmental Administrative Orders] and determining where it is desirable to supersede them with USPTO-specific guidance...” Clearly delineating which HR policies and procedures it will be following is important progress toward creating a understandable and transparent HR framework for use by both USPTO internal staff, decision-makers, and external reviewers. USPTO also will need to take action to create organization descriptions for USPTO line offices such as the Human Resources Office, which are not included as part of the current Department Organization Order series.

## **II. Process Used to Fill HR Director Position Was Flawed**

Since March 2003, USPTO has taken steps to fill the vacant HR director position. After the departure of the HR director, the deputy was named acting director. The CFO/CAO requested that an attorney be detailed from the Office of General Counsel. The detail was to an unclassified position titled “operations manager” in OHR. Although the attorney had no previous experience in managing a human resources office, this unclassified “operations manager” position essentially contained all the duties of the HR director.

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<sup>4</sup> Prior to enactment of the act, the Department had oversight responsibility for USPTO’s HR operations.

Since the attorney held an “excepted service appointment,”<sup>5</sup> he could not be permanently reassigned to a competitive service position like that of the HR director. Under supervision of this same “operations manager,” the OHR staff began the process of recruiting and filling the HR director position.

*A. HR Director’s Position Description Was Improperly Classified*

5-U.S.C. § 5107 requires that agencies classify and assign grades to positions under their jurisdiction according to standards set by the Office of Personnel Management. These standards link job definitions to specific work functions and responsibilities, thereby providing the basis for assigning a title, series, and grade to each position.

Up until July 15, 2003, the position description for the USPTO’s HR director position was classified as a GS-201 (human resources management) position. In preparing to hire a new HR director, the OHR classification specialist told us that the CFO/CAO and operations manager requested that he create a new position description. To accomplish this, he worked with the “operations manager” and the CFO/CAO to define the new position. The specialist then classified the position description as a GS-301 (miscellaneous administration and program series) position. The change in series, according to the specialist, was overseen by the “operations manager” and certified by the CFO/CAO.

When we asked outside classification experts, including OPM, to independently review the newly proposed position description, they stated that the HR director position, as written, should be a GS-201, not the reclassified GS-301. USPTO should take steps to ensure that the HR director position description is properly classified.

*B. Announcement and Application Process Did Not Follow HR Regulations*

We found significant problems with the announcement and application process used for the recruitment of the HR director in August 2003. For example,

- **The vacancy announcement did not ensure the availability of a sufficient pool of high-quality candidates.** Federal personnel regulations require that recruitment actions be sufficiently broad to ensure the availability of high-quality candidates, taking into account the nature and level of the positions covered. USPTO unfortunately limited the area of consideration to primarily federal employees in the

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<sup>5</sup> As defined in section 2103 of Title 5, the excepted service is a residual category of the civil service—that is, it comprises those civil service positions that are not in the competitive service or the SES. The Office of Personnel Management (OPM) has described the competitive service as including positions subject to the appointment provisions in chapter 33 of Title 5; the excepted service includes all other positions (excluding those in the SES), regardless of whether they are subject to other chapters of Title 5. For excepted service positions, each agency develops, within basic requirements prescribed by law or regulation, its own hiring system, which establishes the evaluation criteria to be used in filling these excepted positions.

Washington, D.C. commuting area.<sup>6</sup> When the process yielded only 3 applicants (2 of which were not qualified because they were not in the Washington, D.C. commuting area), we were troubled to learn that the OHR did not re-announce the vacancy and extend the area of consideration as permitted. USPTO staff stated that they initially believed that sufficient applicants would be found in the Washington, D.C. commuting area, but gave no explanation for their decision not to re-announce the position when, in fact, that did not turn out to be the case. USPTO needs to ensure that recruitment actions are sufficiently broad to ensure the availability of high-quality candidates.

- **Applicants' qualifications were not verified.** To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by the Office of Personnel Management. These qualifications were listed as part of the HR Director announcement and application process. HR staffing specialists are responsible for evaluating all applicant qualifications to make sure that an applicant's experience meets the knowledge, skills, and abilities needed to adequately perform the job. However, we found that staffing specialists did not evaluate applicant qualifications. Instead, the specialist allowed applicants to "self-rate" their experience levels, and used the results of this self-rating and associated computer scoring to determine whether applicants were qualified for the job.

We were told that the "practice" to allow applicants to conduct self-ratings without review was reportedly made to "speed up the hiring process." We question the appropriateness of this practice. An applicant's opinion of his or her qualifications and abilities is not objective. If the staffing specialist fails to make an independent evaluation of the rating in comparison with the applicant's resume, the automated staffing system may provide unreliable data and fail to identify the best-qualified candidates. USPTO needs to ensure that staffing specialists comply with federal regulations to evaluate applicant qualifications.

- **The vacancy announcement and application process did not sufficiently address requirements of the Veterans' Employment Opportunities Act (VEOA).<sup>7</sup>** When an agency accepts applications from outside its own workforce using a merit process, the VEOA allows veterans to compete for these vacancies under merit promotion procedures. However, confusion resulting from the eligibility-screening question used by USPTO may have prevented some eligible veterans from applying for the job. USPTO used the following eligibility-screening question:

"Are you eligible to apply for this vacancy announcement based on the following statement of who may apply? (*USPTO Employees with Status in Washington, DC commuting area; Current Federal Employees with Status in Washington, DC*)"

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<sup>6</sup> Other eligible applicants included reinstatement eligibles and DOC surplus and displaced employees in the Washington, DC commuting area.

<sup>7</sup> Veterans who are selected are given career or career conditional appointments. Veterans are those who have been separated under honorable conditions from the armed forces with 3 or more years of continuous active service.

*commuting area; Reinstatement Eligibles in Washington, DC commuting area; DOC surplus, Displaced Employees in Washington, DC commuting area)*  
If yes, how?"

Since the statement of who may apply did not include VEOA eligibles, veterans who were in fact eligible to apply may have answered “no” and eliminated themselves from further consideration. When we questioned the operations manager about this statement, he stated that failure to include VEOA eligibles among the list of eligible applicants was not a USPTO HR staff problem, but a problem with the automated system that they were using. However, other Commerce offices using the system do not have this problem, and the Commerce “expert” on the system did not agree. Instead, she stated that users need to be knowledgeable about HR requirements and that the system can be used accordingly.

In short, managers and staff either overlooked federal regulations or stated that the problems were caused by the automated staffing system. Based on our conversations with USPTO staffing specialists, it appears that these problems are not limited to that particular recruitment, and in fact reflect systemic weaknesses within OHR. We believe USPTO needs to take steps to ensure that HR staff comply with federal personnel regulations and that automated tools are used in a way to support these regulations.

***C. Process Used to Recruit for the New HR Director Highlights the Need and Importance of USPTO Clearly Establishing and Adhering to Appropriate HR Management Controls***

Title 5 U.S.C. details specific merit system principles that should be upheld by federal agencies. One of these principles requires managers to ensure that “recruitment should be from qualified individuals from appropriate sources, in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.”<sup>8</sup> We believe that by having the “operations manager” oversee the creation of the reclassified GS-301 position description, USPTO failed to comply with the spirit of Title 5. This action—coupled with the lack of a permanent manager, missing HR policies and procedures, questionable classification practices, and non-compliant recruitment actions—raise significant concerns regarding USPTO’s ability to ensure adherence to the merit system principles designed to ensure that fair and open competition occurs.

USPTO must also promote an HR environment that operates on integrity, the highest ethical values, and sound human capital management practices, and ensure that OHR itself is staffed by employees who have the full competencies needed to accomplish their assigned duties. USPTO has taken some steps to address our concerns. For example, based on our discussions with CFO/CAO senior staff in January 2004, USPTO is working with OPM to recruit for a new HR director, is using a contractor to assess the OHR organizational structure and knowledge, skills, and abilities of OHR staff, and has

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<sup>8</sup> 5 U.S.C § 2301(b)(1)

ended the detail of the “operations manager” who returned to the Office of General Counsel in January 2004. However, based on our previous findings regarding the OHR and the previous attempt to recruit an HR director—a prominent position at USPTO—we believe that USPTO needs to send a strong message to staff regarding its commitment to upholding merit system principles. In addition, because of the significance of the HR management position, USPTO should also ensure that the HR director has the requisite knowledge, skills, and abilities and consider convening a panel with representatives from other USPTO organizations to assist in the selection of the new HR director.

#### ***D. Summary of Specific USPTO Comments to the Draft Report and OIG Response***

USPTO did not believe that classifying its HR director position in the 301 series indicated a “de facto” misclassification and pointed out that other federal agencies are classifying human resources positions in the 301 series. USPTO also stated that it wanted a strategic manager that could focus on matters related to the President’s Management Agenda and **chose** the broader 301 series, to permit a broader range of candidates to qualify.

As we discussed in the report, outside classification experts reviewed the position description written for the announced vacancy and concluded that based on application of OPM standards to those duties, the position was misclassified.

USPTO also stated that our concern about USPTO’s self-rate procedure may need further evaluation by all Inspector General Offices to identify appropriate safeguards for this process. USPTO points out that OPM uses a self-rate procedure similar to the one used by USPTO and that OPM encourages the use of electronic application processes because it simplifies recruitment and hiring. Our concern in the report was not about USPTO’s using a self-rate procedure as part of its electronic application process. We were concerned about the HR specialist’s belief that it was not the specialist’s responsibility to ensure that applicant’s self-ratings were consistent with the applicant’s description of their level of experience. OPM requires HR specialists to rank applicants with higher proficiency levels above those with lower proficiency levels. Without taking some steps to independently assess self-ratings, HR specialists cannot ensure that applicants with higher proficiency levels will be ranked above those with lower proficiency levels and thus not get the most qualified applicants for the job.

### **III. Recommendations**

The Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the U.S. Patent and Trademark Office (USPTO) should take the necessary actions to create an effective OHR with strong leadership. At a minimum he should do the following:

1. Ensure that USPTO works with the Department and OPM to officially obtain delegated examining authority.

2. Ensure that USPTO develops HR organizational descriptions, policies, and procedures, in accordance with the intent of DOO 10-14.
3. Ensure that staff, using the automated staffing system, comply with federal personnel regulations and the VEOA.
4. Ensure that the HR director position, as described, be properly classified.
5. Ensure that the OHR staff possess the expertise and receive the training necessary to accomplish their assigned duties.

cc: Jo-Anne Barnard, CFO/CAO, USPTO  
Carol Stout, Audit Liaison, USPTO

**UNITED STATES PATENT AND TRADEMARK OFFICE**

CHIEF FINANCIAL OFFICER AND CHIEF ADMINISTRATIVE OFFICER

MAY 17 2004

MEMORANDUM FOR: Michael Sears  
Assistant Inspector General for Auditing

FROM: Jo-Anne Barnard  
Chief Financial Officer and  
Chief Administrative Office *James Michael Keene for*

SUBJECT: Response to Draft Audit Report No. BTD-16432-4-0001

I appreciate the opportunity to submit comments on the draft audit report. In general, the USPTO concurs with the draft report's findings and recommendations and will move expeditiously to address these important matters. It is important, however, to recognize the significant steps the USPTO has already taken to improve the operations of its Office of Human Resources (OHR).

When I contacted the Inspector General to discuss the allegations that triggered the current audit, we agreed that the Office of the Inspector General (OIG) should proceed with an independent analysis of the issues. At the same time, because of our need to ensure the integrity of our human resources functions and the history of complaints that were generated by and directed at this important area, we began our own assessment of how best to manage OHR operations in both the short and long term.

As a key part of this effort, we retained a contractor to assess our OHR organization and its staff. We tasked the contractor to recommend short- and long-term strategies to enhance (1) the skills, knowledge and ability of OHR staff, (2) the organizational/management structure, and (3) the leadership capabilities of all OHR employees. Subsequently, the contractor held group and one-on-one interviews with and skills assessments of nearly all OHR employees; and identified specific actions that are required to improve the organization's skills and service delivery and that will enable it to develop the human capital skills OHR employees will need to be effective in assisting management in implementing the USPTO's Strategic Plan. The USPTO will take the necessary actions to ensure that OHR identifies any skill gaps, provides a solid plan that each employee and his/her supervisor can use in scheduling training, developmental assignments and self-development activities.

As you know, we cancelled the previous recruitment for an OHR Director. We are now in the process, with assistance from the Office of Personnel Management (OPM), of

conducting a new recruitment for a permanent director. OPM has informed us that the recently closed vacancy announcement generated numerous qualified applicants. We hope to complete the evaluation, interview and selection process for this position by the end of July. We note, however, that in handling this recruitment, OPM employed an electronic application process that involves a candidate "self-rate" procedure similar to the "COOL" system procedure about which the draft report expresses concern. Since OPM has determined, in line with the President's e-Government initiative, that agencies should increase their reliance on an electronic application process because it simplifies Government recruitment and hiring, it may be appropriate for you to raise your concerns about the self-rate procedure to other agency Inspectors General with a goal of identifying appropriate safeguards.

In regard to the specifics of the draft report, we believe that it contains a few statements that should be clarified or corrected before issuance of the final audit report. First, page 3 of the draft report refers to a September 2000 OIG review that found "substantial mismanagement of important personnel records," referencing the previous report's findings regarding the USPTO's maintenance of Standard Form 50's. The way this reference is made could lead a reader to infer that this situation may not have been corrected. On the contrary, the USPTO reacted quickly to the IG's findings by hiring a contractor to manage Official Personnel Files, and by putting in place performance measures that require the timely and accurate maintenance of these important records. Second, we believe the statement made on page 7 that the Operations Manager "had no previous experience in human resources management" is inaccurate, because the records of the individual in question show that prior to his detail to OHR, the Operations Manager had military personnel experience and, in his role in the General Counsel's Office, had successfully handled numerous employee relations and labor relations cases.

Further, we are concerned that Finding I.B. of the report implies that the USPTO's decision, subsequent to enactment of the Patent and Trademark Efficiency Act (Efficiency Act), to continue to rely upon DOC policies and procedures in the human resources area is somehow improper. DOO 10-14 section 3.01.e.7 reflects the USPTO Director's broad authority under the Efficiency Act to establish USPTO policies and procedures. The Director exercised that authority shortly after the effective date of the Efficiency Act to provide that "[u]ntil otherwise indicated, the USPTO will continue to follow . . . Department of Commerce regulations applicable to the Patent and Trademark Office." 65 Federal Register 17858, April 5, 2000. While the USPTO is currently reviewing all DAOs and determining where it is desirable to supersede them with USPTO-specific guidance, nothing in DOO 10-14 precludes the USPTO from continuing to rely on Department guidance or requires the issuance of any specific USPTO Agency Administrative Orders or other guidance.

As the draft audit report recognizes, there is apparent confusion at OPM concerning the current legal relationship between the USPTO and OPM. The USPTO agrees that it will be beneficial to obtain a signed document that reflects the delegation of examining (DEU) authority to the USPTO that was effected by the Efficiency Act. In this regard, we believe that a clear statement in the final audit report addressing the effect of the

Efficiency Act on the OPM delegation would be very helpful to us in clarifying this issue with OPM and in obtaining the requisite document.

We also have a specific response to one of the draft report's conclusions, as set forth below:

**Finding: HR Director's Position Was Improperly Classified**

USPTO Response: Since classification of positions requires the application of judgment to established standards, we do not agree that it is an established fact, as the report states, that the OHR Director's position was improperly classified. Rather, we believe the OIG's finding represents a difference of opinion on this issue. In creating the position, the USPTO goal was to seek a strategic manager for the Agency's human capital programs and to focus on matters related to the President's Management Agenda. Therefore, in conducting the recruitment in question, we chose the broader 301 series, which would permit a broader range of candidates to qualify. The fact that a number of Federal agencies are classifying their human resource positions in the 301 series would seem to contradict an observation that the choice of the 301 series in this instance was a de facto misclassification.

We appreciate the work that was done by you and your team. If you have questions, please feel free to call me at 703-305-9200.